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Courts as Battlegrounds: Between Democracy and Power

How courts across the globe have become the frontline
in the contest between accountability and domination

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Abstract

Courts have become central battlegrounds in the global struggle between democracy and political power. This article examines how legal institutions, once seen as neutral guardians of the rule of law, are increasingly instrumentalized for partisan interests – raising the stakes for the legitimacy and stability of democratic systems. Ultimately, the endurance of democracy depends not just on legal frameworks, but on public trust in the integrity of these institutions.

I. Introduction

Democracy is never self-sustaining. It relies on institutions that can channel conflict, constrain power, and command trust. Among these, courts hold a unique place: they are the guardians of rules yet, increasingly, the battlegrounds of politics.

In recent years, the judiciary has moved from the quiet margins of governance to the very center of public debate. Legal institutions across jurisdictions as different as the United States, South Korea, and Israel have become decisive actors in questions once thought to belong solely to politics: who governs? On what terms? And with what legitimacy?

This shift raises a fundamental challenge. The authority of law is not secured merely by statutes or constitutions, but by a shared belief that these rules serve the common good. When that belief erodes, courts risk being seen as instruments of power rather than as arbiters of justice – a transformation with profound consequences for both democracy and the rule of law.

This article aims to explore that transformation. It begins by revisiting foundational theories of law and the state before

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examining how they resonate in contemporary crises. Through case studies in three jurisdictions, it shows how courts have been drawn into the gravitational pull of politics, sometimes as bulwarks of accountability, sometimes as weapons of expedience. Of course, new examples of this tension emerge almost daily, and we will only be able to address a select few by way of illustration.

The question at stake is not simply whether courts can survive this pressure, but whether democracies can continue to rely on them as credible gatekeepers in an age of polarization and distrust.

II. The Court as a Tool of Power and a Symbol of Legitimacy – The Specific Problem

Courts have always existed within political systems, but their function has shifted over time. While they have historically been tools of power used to enforce rulers' will, their role changed with the development of constitutionalism and liberal democracy, whose safeguards they became. In recent years, however, this trajectory has begun to reverse: courts are once again at risk of being instrumentalized as tools to legitimize and entrench political power rather than serving as neutral arbiters and protectors of democratic principles. This development can be understood through theory: Schmitt reminds us that sovereignty lies in deciding when rules no longer bind; Weber shows that the authority of the law rests on the belief in its neutrality; and Dworkin insists that the integrity of the law demands coherence between principle and practice. Each of these theories points to the same danger: when courts are perceived as bending to expedience, they lose their legitimacy.

Governments that reshape courts to secure favorable rulings, prosecutors pressured into targeting or sparing political actors, and legal reforms designed to weaken oversight all reflect the same phenomenon: the transformation of law from a boundary of politics into an extension of it. The symbolic power of legality remains, but its substance is hollowed out.

This is the core problem the case studies will illustrate: the Janus face of legalism, where law that should limit power is instead used to entrench it.

1. Foundations in State and Legal Theory

1.1. State Theory

The relationship between legal legitimacy and political authority has long preoccupied state theorists. In *The Social Contract* (1762), Jean-Jacques Rousseau (1712–1778) proposed that leg-

itimate political authority must originate from a voluntary agreement among free individuals to form a political community governed by the “general will”. Rousseau distinguished between the general will, which represents the collective interest, and the will of all, which may merely reflect the sum of individual interests. When laws cease to express the general will and instead serve the desires of a privileged few, the legitimacy of the state crumbles. Legal institutions that prop up private interests under the guise of general authority violate the social contract and thereby erode their own legitimacy.¹

Building on this framework in his lecture “Politics as a Vocation” (1919), Max Weber (1864–1920) defined the modern state as an entity claiming a monopoly on the legitimate use of physical force within a given territory. However, Weber was equally interested in the foundations of legitimacy. He identified three types of legitimate political authority: traditional, charismatic, and rational-legal. The rational-legal type, dominant in modern states, depends on impersonal rules and institutions, notably courts. Yet Weber warned that legitimacy must be believed in – it is a sociological fact, not a legal given. According to Weber’s theory, therefore, the mere legality of courts’ decisions does not guarantee compliance or respect if people perceive them as politicized or captured.²

To deepen this understanding, Carl Schmitt (1888–1985) introduced a provocative and controversial idea in *Political Theology* (1922): sovereignty is defined by the power to decide on the exception. For Schmitt, legal order ultimately rests on the authority to suspend it, revealing the fragility of legality under political pressure. When governments manipulate legal systems to suit executive needs, declare states of emergency, and bypass judicial checks, they expose the law’s dependence on political will rather than normative coherence. Schmitt’s theory offers a dark lens through which to view the modern erosion of judicial independence: not as a failure of law, but as its politically determined nature.³

Together, these three perspectives expose the structural vulnerabilities of legal institutions within the broader architecture of state power. They emphasize that courts are only as legitimate as the political orders they serve and that this legitimacy can be conditional, contested, and revocable.

1 Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Penguin Books, 1968).

2 Max Weber, “Politics as a Vocation,” in *From Max Weber: Essays in Sociology*, trans. and ed. Hans Gerth and C. Wright Mills (Oxford University Press, 1946).

3 Carl Schmitt, *Political Theology*, trans. George Schwab (University of Chicago Press, 2005).

1.2. Legal Theory

Complementing state theory, legal theory offers critical insights into the internal functioning and normative aspirations of courts. In *The Spirit of the Laws* (1748), Montesquieu (1689–1755) developed the doctrine of the separation of powers as a structural safeguard against tyranny. According to Alexander Hamilton, in *Federalist No. 78*, the judiciary is the least dangerous branch because it possesses “neither force nor will but merely judgment”. However, this assumed a judiciary that was independent. Montesquieu warned that if the judiciary merges with the executive or legislative powers, liberty is no more. Thus, a judiciary subject to political influence ceases to perform its checking function and instead reinforces authoritarian governance.⁴

Moving into the 20th century, H.L.A. Hart (1907–1992) emphasized the distinction between primary rules (governing conduct) and secondary rules (governing the creation and interpretation of laws) in *The Concept of Law* (1961). A critical secondary rule is the “rule of recognition”, which identifies valid legal norms. Hart acknowledged that a legal system could meet all formal requirements and still produce morally abhorrent laws, as seen, e.g., in Nazi Germany. Thus, the existence of a rule-based legal order does not ensure justice. Courts enforcing such laws, even if procedurally valid, may fail to command moral authority.⁵

Responding to Hart, Ronald Dworkin (1931–2013) argued in *Law’s Empire* (1986) that law is a system not only of rules but also of principles and that judicial decisions must strive to present the legal system in its best moral light. Judges are not mere mouthpieces of law but active interpreters of societal values. When courts prioritize formal consistency over substantive justice, when they abandon moral interpretation in favor of political expedience, they cease to function as legitimate democratic institutions.⁶

Taken together, these theorists show that legal legitimacy is not a given but must be constantly earned – through both substantive justice and procedural fairness. When either element is compromised, courts risk becoming tools of domination rather than instruments of justice.

2. Modern Manipulation and the Democratic Dilemma: Courts as Weapons?

The term “lawfare”, as coined by U.S. Air Force Major General Charles J. Dunlap, Jr., originally described the use of law as a means of achieving military objectives. It has since evolved to

refer more broadly to the use of legal tools to achieve political goals. Lawfare can involve criminal investigations, administrative decisions, constitutional reinterpretations, or the strategic use of courts to weaken political opponents. Its defining feature is not the use of law per se, but the instrumentalization of legal processes to gain power while maintaining a veneer of legitimacy.⁷

This phenomenon is evident across the political spectrum, with both right- and left-leaning actors engaging in the instrumentalization of legal processes. In South Korea, for example, right-leaning then-President Yoon sensed a legislative dictatorship when the opposition-dominated parliament defied him by rejecting the budget and thus, in his view, undermined the constitutional state and democracy. This conflict resulted in a declaration of martial law on 3 December 2024 and the eventual impeachment of Yoon in April 2025. In Israel, Prime Minister Benjamin Netanyahu has led efforts to curtail the powers of the judiciary under the pretense of restoring balance among state institutions. Critics warn that such reforms could eliminate judicial review of government actions, thereby threatening the rule of law. Here, lawfare manifests not through prosecution but through institutional restructuring. In Spain, conversely, the PSOE-Podemos coalition temporarily blocked Senate appointments to the Constitutional Court in 2022 while simultaneously advancing emergency economic legislation, a maneuver critics described as pressuring the Court to avoid adverse rulings. In Argentina, the 2013 “Democratization of Justice” package backed by the Kirchner administration sought to expand the Supreme Court and place partisan allies on the Magistrates Council, raising alarms about judicial capture. And in the United States, legal proceedings against President Donald Trump have sparked fierce debate. Supporters argue that no one is above the law; critics contend that the legal process is being used to neutralize a political rival. Such contests demonstrate how even ostensibly legitimate legal actions can be perceived as lawfare in highly polarized environments.

These examples, some of which will be further elaborated below, show that one of the thorniest challenges facing modern democracies is the differentiation between legitimate judicial oversight and politically motivated prosecution – a democratic dilemma between accountability and politicization. On the one hand, the very idea of the rule of law demands that even the highest officials be held accountable through legal mechanisms. On the other hand, prosecutions initiated in politically charged contexts risk being perceived or even actually functioning as tools of political vendetta.

⁴ Montesquieu, *The Spirit of the Laws*, trans. Anne M. Cohler et al. (Cambridge University Press, 1989).

⁵ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford University Press, 1994).

⁶ Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986).

⁷ Charles J. Dunlap Jr., “Lawfare Today: A Perspective,” *Yale Journal of International Affairs* 3, no. 1 (2008): 146–154.

The dilemma intensifies in contexts of weak judicial independence or high polarization. When prosecutions align too neatly with political cycles or targets, they can appear to be motivated more by strategic calculation than legal merit. Conversely, inaction in the face of clear legal violations sends a dangerous signal that some actors are beyond the reach of the law.

III. Case Studies

This theoretical and structural backdrop sets the stage for examining real-world examples showcasing the tension between democratic accountability and political power play. The cases of the United States, South Korea and Israel will illustrate how courts can act as sites of both democratic renewal and democratic erosion. These case studies will allow us to evaluate whether modern legal systems can still function as legitimate arbiters in an era increasingly marked by political fragmentation and institutional distrust.

1. Case Study I – The United States: The Janus Face of Legalism

1.1. Introduction: America's Judicial Paradox

The United States has long positioned itself as a bastion of constitutional governance, with an independent judiciary serving as a cornerstone of its democratic architecture. Yet recent years have exposed visible strains in this framework as courts have been thrust into the center of some of the country's most divisive political and social debates.

A salient illustration of this dynamic is the U.S. abortion jurisprudence. In *Roe v. Wade* (1973), the Supreme Court constitutionalized a right to abortion, later reframed but reaffirmed in *Planned Parenthood v. Casey* (1992). In *Dobbs v. Jackson Women's Health Organization* (2022), however, the Court reversed course and returned regulatory authority to the states. Across these dramatic shifts, legitimacy debates emerged from opposing directions: *Roe* was long attacked by critics as an act of judicial overreach, while *Dobbs* was condemned for disregarding decades of precedent. This trajectory underscores that perceptions of politicization are not unidirectional but shift with changes in judicial composition, political coalitions, and societal values. It also highlights the profound difficulty of maintaining public trust when constitutional interpretation repeatedly oscillates along ideological lines.

This long-running controversy provides important context for understanding more recent developments. Central to today's tensions are the legal and political controversies surrounding Donald Trump, spanning his first presidency, the 2020 election,

the January 6 Capitol riot, and a series of unprecedented indictments. These developments raise core questions in connection with topics explored in Chapter II, in particular the question of whether the judiciary can remain a neutral arbiter or whether it is increasingly pulled into the gravitational field of politics.

The example of the U.S. uniquely embodies the duality of legalism: the law functions both as a mechanism of accountability and as a perceived instrument of political contestation. This tension invites a re-examination of Rousseau's social contract, Weber's sociological legitimacy, and Schmitt's theory of sovereignty, as these theories are increasingly relevant to the current American (and global) legal-political landscape.

1.2. Trump, January 6 2021, and the Politicization of Prosecution

The events of January 6, 2021, when demonstrators stormed the U.S. Capitol, marked a significant rupture in American democratic norms. In its aftermath, more than 1500 individuals have been prosecuted so far. Legal scholars and commentators remain divided: some praise the enforcement of accountability, while others question the consistency and fairness of prosecutorial strategy.



FBI poster seeking information on violence at the Capitol Building⁸

The subsequent indictments of Donald Trump, ranging from alleged financial improprieties in New York to attempts to subvert electoral outcomes in Georgia, became lightning rods for debate. While the legal basis for these actions is supported by statutory frameworks and grand jury findings, the optics of these proceedings are inseparable from the country's political system and the associated polarization and back and forth between the dominance of the political opponents. For critics, the risk lies not only in potential prosecutorial overreach but also

⁸ *FBI Seeking Information Capitol Violence Poster*, Wikimedia Commons, <https://commons.wikimedia.org/wiki/File:FBI_Seeking_Information_Capitol_Violence_Poster.jpg>, License: <https://creativecommons.org/licenses/by-sa/4.0/> (accessed 20 September 2025).

in the erosion of public trust in the neutrality, consistency, and fairness of the justice system itself – a dynamic Weber foreshadowed when he warned that legitimacy must be socially grounded, not just legally constructed.

1.3. Institutional Strains and the Shifting Boundaries of Neutrality

Beyond individual prosecutions, broader institutional dynamics have surfaced. Key institutions, from the Department of Justice to federal courts and elite law firms, have come under heightened scrutiny. Conservative commentators often highlight what they see as an ideological imbalance within legal academia, major law firms, and prosecutorial offices, arguing that these institutions lean disproportionately toward progressive viewpoints. By contrast, progressive critics tend to focus on perceived inconsistencies in the application of the law, warning against selective enforcement and instances where political considerations may lead to undue restraint in pursuing accountability.

These critiques reflect a systemic struggle over what Schmitt termed the power to decide on the exception: who interprets norms, and under what conditions may they be bent or suspended? Even if American democracy avoids overt authoritarian tendencies, the growing sense that legal institutions may be swayed by shifting political majorities challenges the separation of law from politics. This tension reveals how legal systems, while resilient, are not immune to structural stress and political recalibration.

1.4. The Prospect of a Convicted Candidate

One of the most profound constitutional ambiguities in U.S. law is the absence of restrictions barring individuals with criminal convictions from seeking or holding the presidency. This legal gap, though historically rather marginal, now sits at the center of public debate.

Rousseau's notion of the general will, which implies collective legitimacy through shared principles, becomes particularly relevant when a large electoral base remains loyal to a candidate facing criminal trials. This dissonance between electoral support and judicial process underscores a core paradox in modern liberal democracies: legality permits what legitimacy may not condone.

Ronald Dworkin's emphasis on the law's integrity, i.e., the need for judicial decisions to align with a coherent moral and legal narrative, is also tested under such circumstances. If voters elect a convicted individual, and that individual in turn appoints officials under similar legal clouds, the system may begin to

deviate from its self-professed principles. Such a development could set in motion a self-reinforcing cycle in which political leaders protect one another from legal consequences. Over time, this would not only diminish public trust in the justice system but also erode the enduring principles and standards that sustain the rule of law.

1.5. The Rule of Law and Public Confidence

Despite these tensions, the U.S. retains quite a robust legal infrastructure. Federal courts continue to operate with independence, lower courts have upheld election integrity, and judicial review remains a check on executive overreach. However, these structural strengths are increasingly dependent on public confidence.

As Weber noted, the authority of the law authority does not rest on coercion alone; it requires the acceptance of those governed. In a fragmented media landscape, where narratives diverge not just on their interpretation of the facts but on the facts themselves, legal actions can be interpreted as partisan maneuvering even when procedurally sound. The judiciary's challenge, therefore, is not only to rule correctly but to be seen as doing so without bias – a requirement increasingly difficult to meet in an era of distrust and politicized truth.

1.6. Conclusion: Between Structure and Sentiment

The United States presents a complex portrait of legalism in flux. Its institutions continue to function according to their constitutional design, but the legitimacy of those functions is now contested in both elite discourse and popular sentiment.

This chapter has explored how the theoretical insights from Chapter II above map onto contemporary American reality. The U.S. judiciary remains a potent symbol of democratic resilience. Yet unless the gap between legal procedure and public legitimacy can be narrowed, the very structures designed to protect democracy may find themselves destabilized by the political forces they are tasked to regulate.

The enduring question, then, is not only whether a legal system can hold power to account but also whether it can do so in a way that is both effective and credible in the eyes of a deeply divided society. As outlined in Chapter II, the legitimacy of governance does not depend on the mere existence of legal mechanisms but on the shared belief that those mechanisms serve the common good rather than partisan ends. This tension lies at the very heart of the Janus face of legalism – its forward-looking promise to uphold justice and its backward-facing risk of sliding into the historical pattern of serving political rather than democratic ends. The case studies that follow will further

show how this duality plays out across different jurisdictions, revealing the fragile balance between law as a safeguard of democracy and law as a tool of power.

2. Case Study II: South Korea in 2024 – A Dictatorship of the Legislative?

2.1. From Authoritarian Legacy to Constitutional Crisis: The 2024 Martial Law Decree

Since the founding of the Republic in 1948, South Korea has declared martial law 17 times, primarily during periods of political turmoil and military rule. The early decades of the Republic were marked by recurring crises, such as the Korean War (1950–1953), the April Revolution of 1960, and the military coups of 1961 and 1979, where martial law served as a tool to consolidate power and suppress dissent. These episodes often coincided with transitions of authority and were instrumental in shaping South Korea's authoritarian legacy. While frequent in the authoritarian decades, such measures have been exceptional in the democratic era since the late 1980s, with the last prior imposition dating to 1980 during the Chun Doo Hwan coup period. The democratic reforms of 1987 introduced constitutional safeguards intended to confine emergency powers to genuine national security threats, making any invocation of martial law politically and legally extraordinary.

On 3 December 2024, President Yoon Suk Yeol unexpectedly declared martial law in a televised address, alleging “anti-state” activity by the opposition-controlled legislature and citing purported collusion with North Korea. The announcement came amid months of escalating political confrontation, including legislative gridlock over budgetary and judicial appointments and a climate of deep polarization. Yoon framed the situation as a constitutional emergency, arguing that the Assembly's actions threatened the stability of the state. Despite military attempts to block access, lawmakers convened after midnight and voted 190 to 0 votes to terminate the decree; within hours, Yoon rescinded it, making this one of the briefest and most controversial invocations in Korean history.

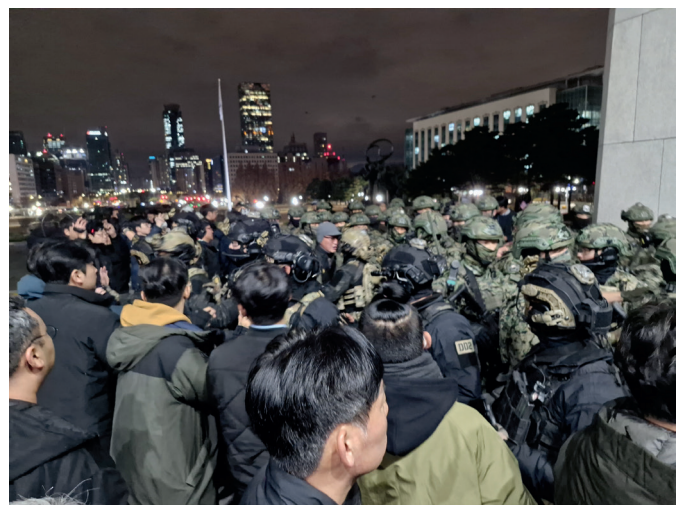
The rapid reversal did little to calm the political storm. Public protests erupted nationwide, and civil society groups condemned the move as an authoritarian overreach. The episode triggered a constitutional crisis: impeachment proceedings began in December 2024 and culminated on 4 April 2025, when the Constitutional Court unanimously upheld Yoon's removal, finding no constitutional emergency and condemning the use of troops to obstruct the National Assembly. The Court's decision was widely interpreted as a reaffirmation of democratic norms, but it also exposed the fragility of institutional trust in

moments of acute political conflict. A snap presidential election followed on 3 June 2025, bringing opposition leader Lee Jae Myung to power the next day.

2.2. Executive Emergency Power vs. Parliamentary Oversight

The December 2024 decree made evident the structural tension in South Korea's constitutional architecture: reconciling executive emergency prerogatives with parliamentary checks. Article 77 of the Korean Constitution authorizes the President to proclaim martial law only in conditions akin to war while expressly empowering the National Assembly to end such measures. The episode shows how precarious that balance becomes once an ordinary political stalemate is recast as an “exceptional” threat. In Weber's terms, a measure may claim formal legality, but it commands authority only so long as citizens and institutions believe in its legitimacy; that belief quickly frays when emergency rhetoric substitutes for demonstrable necessity.

The President's framing also neglected the democratic foundation of the Assembly's authority. The opposition's dominance in parliament was the result of free and fair elections, reflecting the preferences of the electorate and, to a significant extent, the President's own declining popularity. In a constitutional democracy, sovereignty ultimately resides with the people, and the legislative majority is an expression of that principle. By disregarding this electoral reality, the executive response risked undermining the very legitimacy that constitutional emergency powers are meant to safeguard.



South Korean soldiers outside the National Assembly⁹

⁹ South Korean soldiers outside the National Assembly, Wikimedia Commons, <https://commons.wikimedia.org/wiki/File:South_Korean_soldiers_outside_the_National_Assembly.png>, License: <https://creativecommons.org/licenses/by-sa/2.0/> (accessed 20 September 2025).

What made the crisis distinctive was not the proclamation alone but the attempts to disable the Assembly's check. Security forces limited access to the parliamentary complex; military units encircled the grounds and sought to secure parts of the building to delay proceedings. Lawmakers encountered physical barriers and disorder as they tried to meet. Parallel reports pointed to raids on state bodies and preparations to detain opposition figures. These moves shifted the response from enforcing law to using law instrumentally, undermining the rational-legal confidence on which constitutional emergency powers depend. In the end, the legislature and judiciary reasserted that confidence, but only after the episode had exposed how quickly legality can lose its persuasive force when pressed by political expediency.

2.3. Lawfare and the Instrumentalization of Legal Norms

The 2024 Korean martial law episode is not only a constitutional crisis but also a striking example of lawfare: the strategic use of legal mechanisms to achieve political objectives under the guise of legality. By invoking Article 77 of the constitution, the President framed a political standoff as an existential emergency, transforming constitutional safeguards into tools of executive dominance. This move illustrates a core dilemma in many contemporary democracies: when law becomes a weapon in political conflicts, its normative authority erodes. The deployment of troops to obstruct the Assembly and the reported plans to arrest opposition figures shifted the response from upholding legal order to exercising political coercion, reinforcing the perception that legality was being instrumentalized rather than upheld.

Lawfare operates in this gray zone: actions remain formally anchored in legal provisions, yet their purpose is to neutralize opponents rather than protect the constitutional order. In South Korea, institutional resilience through legislative defiance and judicial review ultimately reversed such an attempt.

2.4. The Pendulum of Justice Swings Back

If the declaration of martial law stretched the constitutional text toward its outer limits, the Constitutional Court's unanimous decision of 4 April 2025 marked the swing back toward the rule of law. By rejecting the claim of an "exceptional situation," the Court held that neither the facts nor the procedures satisfied the constitutional threshold for emergency powers. The ruling did more than resolve a technical dispute; it reaffirmed that legality cannot be detached from legitimacy.

Ronald Dworkin's account of *law as integrity* clarifies the Court's stance. From this point of view, judges interpret statutes and constitutional provisions in a way that both fits the

history of the legal system and justifies it in moral terms. Read in this light, Article 77 is no blank check: it sits alongside commitments to democratic accountability and limited government, and it treats emergency powers as truly exceptional rather than as routine instruments of governance. The Court's reasoning echoed that approach by insisting that the constitutional text be applied consistently with the principles that give it meaning.

In practical terms, the decision restored institutional balance and signaled that attempts to frame ordinary political conflicts as existential emergencies will be tested against standards of coherence and fairness, not merely formal citation. The judiciary thus acted not as an auxiliary to power but as a guardian of constitutional integrity, reinforcing public confidence that law constrains authority rather than serving narrow political advantage.

3. Case Study III: Israel – Judicial Reform as a Tool of Power and the Supreme Court's Constitutional Review

3.1. Background: The Judicial Role in Israeli Democracy

Israel's legal system has long been defined by a strong and independent judiciary, with the Supreme Court at its core. In the absence of a formal written constitution, the Court has relied on Israel's Basic Laws to perform constitutional review and safeguard democratic principles.

Over the years, the Supreme Court has assumed a pivotal role in overseeing the actions of both the executive and legislative branches. One of its most significant tools has been the "reasonableness standard," which allowed the Court to invalidate governmental decisions deemed arbitrary, disproportionate, or lacking a sound factual basis. This doctrine was particularly influential in matters involving public appointments, dismissals, and the exercise of administrative discretion.

Through such mechanisms, the judiciary has functioned as a critical check on political power, ensuring accountability and protecting individual rights. The Court's authority has also been reinforced by its reputation as a stabilizing force in a highly dynamic and often polarized political environment.

3.2. Legislating Limits: Amendment No. 3 and the Erosion of Judicial Oversight

On 24 July 2023, the Israeli Knesset, Israel's unicameral national legislature, passed a landmark amendment to the country's constitutional framework. With a narrow majority, it enacted Amendment No. 3 to the Basic Law ("The Judiciary"). The

amendment effectively eliminated the courts' authority to apply the "reasonableness standard" when reviewing decisions made by the government, the prime minister, or individual ministers.

Until then, the reasonableness standard had served as a key legal safeguard. It enabled judges to strike down executive actions deemed extremely unreasonable, particularly in cases involving public appointments, dismissals, and the use of discretionary powers. Its removal marked a profound shift in the balance of power between the judiciary and the executive.

The amendment was part of a broader and highly controversial judicial reform agenda introduced by Israel's 37th government, led by Prime Minister Benjamin Netanyahu. Supporters maintained the reform sought to restore balance between the judiciary and the elected branches by curtailing the former's influence, while critics warned it could expand political control over legal institutions.

The legislative change sparked immediate backlash. Civil society organizations, legal scholars, and former senior officials filed petitions with the Supreme Court, challenging both the substance and the legislative process of the amendment. Notably, the Attorney General sided with the petitioners, citing procedural irregularities and warning of the amendment's far-reaching constitutional implications.

In response, the government and the Knesset, represented by private legal counsel rather than the Attorney General, defended the reform. They argued that the amendment constituted a valid act of constitutional legislation. Moreover, they claimed that the Supreme Court lacked the authority to review Basic Laws, which form the foundation of Israel's uncoded constitutional order.

This legal and political confrontation raised a fundamental question: can the Supreme Court strike down a Basic Law amendment in the absence of a formal constitution? The outcome of this case would not only determine the future of judicial review in Israel but also test the resilience of its democratic institutions.

3.3. A Nation in Motion: Public Response and Legal Backdrop

The amendment triggered months of sustained public protest across Israel. Demonstrations were held nationwide and drew participants from diverse sectors of society, including legal professionals, academics, business leaders, civil servants, and military reservists. Protesters voiced deep concern over the erosion of judicial oversight and the broader implications for democratic governance and the rule of law.



Protests in Rishon LeZion against Amendment No. 3¹⁰

These events unfolded within the framework of Israel's unique constitutional structure. The country does not have a single, codified constitution. Instead, its Basic Laws, gradually developed by the Knesset since 1950, function as foundational legal texts. Most of these laws can be amended by a simple parliamentary majority, without the procedural safeguards typical of constitutional amendments in other democracies.

This flexibility has long been a subject of legal and political debate. Critics argue that it allows ruling coalitions to alter core democratic norms without sufficient checks. The absence of entrenched constitutional protections raises fundamental questions about the limits of legislative authority and the judiciary's role in upholding constitutional principles.

The 2023 amendment thus became a flashpoint in a broader struggle over the future of Israeli democracy. It exposed deep divisions over the balance of power between branches of government, the independence of the judiciary, and the resilience of democratic institutions in the face of majoritarian rule.

3.4. The Bench Assembled: Supreme Court Review and Decision

On 1 January 2024, the Supreme Court of Israel delivered a historic ruling. In an unprecedented full-bench session of all 15 justices, the Court voted – by a narrow majority of eight to seven – to strike down Amendment No. 3 to the Basic Law: The Judiciary.

Twelve justices agreed that, in exceptional circumstances, the Court holds the authority to review Basic Laws. They argued

¹⁰ *Demonstration in Rishon LeZion*, Wikimedia Commons, https://upload.wikimedia.org/wikipedia/commons/e/e2/A_demonstration_in_Rishon_LeZion_against_the_legal_reform.jpg, Lizenz וןדייה, CC BY-SA 4.0 <https://creativecommons.org/licenses/by-sa/4.0> (accessed 24 October 2025).

that such review is warranted when the Knesset exceeds its constituent authority, that is, its power to enact constitutional norms. The majority found that abolishing the reasonableness standard would severely undermine the rule of law and the separation of powers, both of which are fundamental to Israel's democratic character.

The ruling marked the first time in Israeli history that the Supreme Court invalidated a Basic Law amendment. It set a highly controversial precedent for judicial oversight over constitutional legislation, despite the absence of a formal written constitution.

The dissenting justices expressed a range of views. Some questioned whether the Court had any jurisdiction to review Basic Laws at all, warning that such authority could erode the principle of parliamentary sovereignty. Others accepted the Court's authority in theory but argued that the threshold for intervention had not been met in this case. A few proposed a narrower interpretation of the amendment. One that would preserve judicial review in cases of manifestly arbitrary or abusive executive action.

The decision deepened the national debate over the limits of legislative power, the role of the judiciary, and the nature of Israel's constitutional identity. It also raised practical questions about the future application of judicial standards and the potential for further constitutional conflict.

3.5. Legal Aftermath: Reinstatement and Precedent

The Supreme Court's ruling annulled Amendment No. 3 in its entirety. As a result, the reasonableness standard was fully reinstated, retaining its original scope and applicability. The decision had immediate legal consequences. Several pending cases, previously suspended in anticipation of the Court's judgment, were reactivated and proceeded under the restored standard.

This ruling marked a historic first: never had the Supreme Court invalidated an amendment to a Basic Law. The decision established a groundbreaking precedent, affirming that the Court may, under narrowly defined conditions, exercise judicial review over constitutional amendments.

The majority opinion clarified that such intervention is justified only when a Basic Law amendment fundamentally undermines the core characteristics of the State of Israel as a democratic and lawful entity. These characteristics include the rule of law, the separation of powers, judicial independence, and the protection of individual rights.

While the ruling reaffirmed the judiciary's role as a constitutional guardian, it also introduced a new layer of legal complexity. The boundaries of the Court's review authority remain

contested, and future cases will likely test the scope and application of this precedent.

IV. Conclusion

The case studies across the United States, South Korea, and Israel reveal a striking commonality: courts are no longer passive institutions standing above politics but central arenas in which political power and democratic legitimacy are contested. What unites these diverse contexts is the weaponization of legality (lawfare), which blurs the line between genuine accountability and political opportunism.

The introductory theoretical frameworks already foreshadowed this dynamic. Rousseau warned that when law ceases to express the general will, legitimacy collapses. Weber emphasized that legitimacy must be believed in, not merely asserted through legal formality. Schmitt exposed the fragility of legality under the "state of exception," where power decides when norms are suspended. And Dworkin reminded us that law's integrity requires alignment with both principle and moral coherence.

The case studies show each of these theories in action. In the U.S., prosecutions against Trump straddle the line between accountability and political spectacle. In South Korea, martial law was invoked not to safeguard the state but to suspend democratic opposition. And in Israel, judicial reform sought to curtail oversight precisely in order to shield executive authority. Across these examples, the same paradox emerges: legal mechanisms designed to protect democracy can, when instrumentalized, accelerate its erosion.

Whether the pressure comes from right-leaning executives declaring martial law or from left-leaning legislatures reshaping courts for partisan advantage, the underlying danger is identical: once large segments of society cease to recognize judicial decisions as neutral and legitimate, the effectiveness of the entire legal order is at risk of collapsing.

This convergence yields a sobering insight: the health of a legal system is measured not only by its formal architecture but by the public's conviction that law serves the common good rather than partisan ends. Accordingly, every political faction bears a reciprocal duty to preserve broad societal acceptance of courts and other state organs; without that acceptance, even impeccably drafted statutes and meticulously reasoned judgments lose their practical force. Courts that appear captured, selective, or inconsistent risk transforming the *rule of law* into *rule by law*. Once this transformation sets in, legitimacy is no longer maintained through consent but enforced through co-

ercion – a shift that undermines both trust in institutions and the long-term resilience of democracy.

In this sense, courts embody the Janus face of modern legalism. They can anchor constitutional democracy through principled adjudication, or they can become instruments of domination cloaked in legality. The decisive factor is not whether law is applied but how and to what ends.

The ultimate safeguard, beyond more regulation, is the cultivation of trust: trust that courts, regulators, and oversight bodies act with integrity rather than as extensions of political power.

That trust cannot be left to chance. Governments must resist the short-term temptation to instrumentalize the judiciary for partisan gain, legal systems must strengthen safeguards that protect judges and regulators from capture, and individuals – whether as citizens, executives, or compliance leaders – must remain vigilant in defending the principle that no one is above the law. The coming years will test whether democracies can uphold these standards in the face of polarization and populism. If they succeed, courts will remain anchors of constitutional order; if they fail, the Janus face of legalism may turn decisively toward its darker side. ■

Summary in German

Der Artikel untersucht, wie Gerichte weltweit im 21. Jahrhundert zu zentralen Schauplätzen politischer Machtkämpfe geworden sind. Ursprünglich als neutrale Hüter der Rechtsstaatlichkeit gedacht, werden sie zunehmend von politischen Akteuren instrumentalisiert, um eigene Interessen durchzusetzen oder Macht zu sichern. Die Autoren zeigen, dass die Legitimation gerichtlicher Entscheidungen heute nicht mehr allein auf formaler Legalität basiert, sondern vor allem auf dem gesellschaftlichen Vertrauen in die Integrität und Unabhängigkeit der Justiz. Dieses Vertrauen ist jedoch gefährdet, wenn Gerichte als Werkzeuge parteipolitischer Interessen wahrgenommen werden.

Im theoretischen Teil werden zentrale Staatstheorien und rechtsphilosophische Ansätze von Rousseau, Weber, Schmitt, Montesquieu, Hart und Dworkin herangezogen. Rousseau betont, dass Gesetze den Gemeinwillen widerspiegeln müssen, sonst verliert der Staat seine Legitimation. Weber hebt hervor, dass die Autorität des Rechts auf dem Glauben an seine Neutralität beruht. Schmitt warnt vor der Gefahr, dass Souveränität letztlich darin besteht, Ausnahmen zu definieren und damit die Rechtsordnung zu suspendieren. Montesquieu fordert die Gewaltenteilung als Schutz vor Tyrannei, während Hart und Dworkin auf die Bedeutung moralischer Prinzipien und die Notwendigkeit einer kohärenten, gerechten Rechtsanwendung hinweisen.

Anhand von Fallstudien aus den USA, Südkorea und Israel wird illustriert, wie Gerichte sowohl als Bollwerke demokratischer Kontrolle als auch als Instrumente politischer Machterhaltung dienen können. In den USA zeigt sich dies etwa an der Debatte um Roe v. Wade und Dobbs v. Jackson sowie an den juristischen Auseinandersetzungen rund um Donald Trump. Hier wird deutlich, wie schnell Gerichte in den Strudel politischer Polarisierung

geraten und wie schwierig es ist, öffentliches Vertrauen in die Neutralität der Justiz aufrechtzuerhalten. In Südkorea führte die Ausrufung des Kriegsrechts 2024 zu einer Verfassungskrise, in deren Folge das Verfassungsgericht die Absetzung des Präsidenten bestätigte und damit die Bedeutung der richterlichen Kontrolle unterstrich. In Israel wurde durch eine umstrittene Justizreform versucht, die Kontrollfunktion des Obersten Gerichts einzuschränken, was zu massiven Protesten und einer historischen Entscheidung des Gerichts führte, die Reform zu kippen.

Ein zentrales Motiv des Artikels ist das Phänomen der «Lawfare» – die strategische Nutzung rechtlicher Mittel zur Durchsetzung politischer Ziele. Dies kann sich in Strafverfahren gegen politische Gegner, in der Umgestaltung von Gerichten oder in der gezielten Schwächung von Kontrollmechanismen äussern. Die Autoren zeigen, dass diese Entwicklung nicht auf ein politisches Lager beschränkt ist, sondern sowohl von konservativen als auch von progressiven Akteuren betrieben wird. Die Folge ist eine zunehmende Erosion des Vertrauens in die Unabhängigkeit der Justiz und damit eine Gefahr für die Stabilität demokratischer Systeme.

Im Fazit betonen die Autoren, dass die Gesundheit eines Rechtssystems nicht nur an seiner formalen Architektur, sondern vor allem am gesellschaftlichen Vertrauen in seine Integrität gemessen wird. Sobald breite Teile der Gesellschaft gerichtliche Entscheidungen nicht mehr als neutral und legitim ansehen, droht die gesamte Rechtsordnung an Wirkung zu verlieren. Gerichte laufen Gefahr, vom Hüter der Demokratie zum Werkzeug der Macht zu werden. Die Stärkung von Transparenz, Integrität und gegenseitigem Respekt zwischen den politischen Kräften ist daher unerlässlich, um das Vertrauen in die Justiz und damit die demokratische Ordnung zu erhalten. Die kommenden Jahre werden zeigen, ob Demokratien in der Lage sind, diesen Herausforderungen zu begegnen und Gerichte als Anker der Verfassungsordnung zu bewahren.